

ORAL ARGUMENT NOT YET SCHEDULED
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Hearth, Patio & Barbecue
Association, et al.,

Petitioners,

v.

United States Environmental
Protection Agency,

Respondent.

No. 15-1056
(Consolidated with 15-1140)

UNOPPOSED MOTION TO HOLD CASE IN ABEYANCE

Respondent United States Environmental Protection Agency (“EPA”) moves to hold this case in abeyance until EPA takes final action on a proposed rule regarding the regulation at issue in these consolidated cases. Petitioner Hearth, Patio & Barbecue Association (“HPBA”) (No. 15-1056), and Petitioner Pellet Fuels Institute (“PFI”) (No. 15-1140) agree with the relief requested. Respondent-Intervenors American Lung Association, Clean Air Council, and Environmental and Human Health, Inc. do not oppose the relief requested.

In support of this motion, EPA states as follows:

1. Petitioners challenge various aspects of EPA’s final rule entitled “Standards of Performance for New Residential Wood Heaters, New Residential

Hydronic Heaters and Forced-Air Furnaces.” 80 Fed. Reg. 13,672 (Mar. 16, 2015) (the “Rule”).

2. Petitioners have discussed the issues that they are likely to raise in litigation with EPA, and the Court granted multiple unopposed extensions of the briefing schedule to permit time for the parties to engage in these discussions.
3. On April 16, 2018, EPA filed an unopposed motion for further extension with accompanying declaration explaining that EPA had determined that certain issues concerning the Rule warrant an opportunity for public comment, which may lead to revisions of the Rule, and that EPA intends to issue a series of Federal Register notices concerning the Rule. *See* Doc. No. 1726769.
4. The court granted that extension, Doc. No. 1727021, and a further extension, Doc. No. 1751231. Under the current briefing schedule, Petitioners’ Brief(s) are due February 19, 2019; Respondent’s Brief is due May 20, 2019; Intervenors’ Brief is due June 17, 2019; Petitioners’ Reply Brief(s) are due July 8, 2019; the Deferred Appendix is due July 15, 2019; and Final Briefs are due July 22, 2019.
5. On November 30, 2018, EPA published a proposed rule and an advanced notice of proposed rulemaking concerning the Rule at issue in these petitions. *See* Standards of Performance for New Residential Wood

Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces: Proposed Rule, 83 Fed. Reg. 61,574; Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces: Advance Notice of Proposed Rulemaking, 83 Fed. Reg. 61,585.

6. EPA intends to take final action on the proposed rule in summer 2019. *See* Ex. 1, Decl. of Penny Lassiter ¶ 4.
7. It is possible that EPA's final action on the proposed rule will result in changes to the Rule that may affect the issues in this litigation. *See id.* ¶¶ 3, 5.
8. EPA further intends to develop a second proposed rule using the comments received in response to the Advance Notice of Proposed Rulemaking. *See id.* ¶ 4. EPA intends to publish the second proposed rule by late 2019 and take final action by late 2020.
9. EPA therefore moves to hold this case in abeyance until EPA takes final action on the proposed rule published on November 30, 2018, 83 Fed. Reg. 61,574. EPA further requests that the court direct the parties to submit motions to govern further proceedings within 30 days of the publication of final action on this proposed rule. The motions to govern further proceedings may address the status of EPA's intended second proposed rule.

10. Given EPA's pending proposed rule, an abeyance in this Court is warranted. Agencies have inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *ConocoPhillips Co. v. EPA*, 612 F.3d 822, 832 (5th Cir. 2010). It is possible that EPA's final action on the proposed rule might result in revisions to the rule at issue in these proceedings and thereby obviate the need for judicial resolution of some or all of the issues raised by Petitioners.

11. An abeyance would preserve the resources of the parties and the Court. Briefing has not yet begun and oral argument has not been scheduled. EPA does not anticipate that any party would be prejudiced by the abeyance, which is unopposed.

For the foregoing reasons, EPA respectfully requests that the Court grant this motion to hold the case in abeyance until EPA takes final action on the proposed rule published on November 30, 2018, 83 Fed. Reg. 61,574, and direct the parties to submit motions to govern further proceedings within 30 days of the publication of the final action on this proposed rule.

Dated: February 5, 2019

Respectfully submitted,

/s/ Simi Bhat

SIMI BHAT

U.S. Department of Justice

Environment & Natural Resources Division

Environmental Defense Section

P.O. Box 7611

Washington, D.C. 20044

(202) 532-5563

(202) 514-8865 (fax)

simi.bhat@usdoj.gov

Counsel for Respondent EPA

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

I hereby certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 848 words, excluding the parts of the brief exempted under Rule 27(a)(2)(B), according to the count of Microsoft Word.

I further certify that this motion complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in Microsoft Word using 14-point Garamond, a proportionally spaced font.

/s/ Simi Bhat
Simi Bhat

Counsel for Respondent EPA
Dated: September 17, 2018

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document using the Electronic Case Filing (“ECF”) system of this Court. The ECF system will send a “Notice of Electronic Filing” to the attorneys of record.

/s/ Simi Bhat
Simi Bhat

Counsel for Respondent EPA
Dated: February 4, 2019

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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| HEARTH, PATIO & BARBECUE) | | |
| ASSOCIATION, et al.,) | | |
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| Petitioners, v.) | | Nos. 15-1056 & 15-1140 |
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| UNITED STATES ENVIRONMENTAL PROTECTION) | | |
| AGENCY,) | | |
| |) | |
| Respondent.) | | |
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DECLARATION OF PENNY LASSITER

1. I, Penny Lassiter, under penalty of perjury, affirm and declare that the following statements are true and correct to the best of my knowledge and belief and are based on my own personal knowledge or on information contained in the records of the United States Environmental Protection Agency (EPA) or supplied to me by EPA employees under my supervision.

2. I am the Acting Director of the Sector Policies and Programs Division (SPPD), Office of Air Quality Planning and Standards (OAQPS), Office of Air and Radiation (OAR) at the EPA. SPPD is the division within EPA that is, among other things, conducting the review of the Clean Air Act section 111 regulations in 40 CFR Part 60, Subparts AAA and QQQQ, covering wood heaters, hydronic heaters and forced-air furnaces (collectively, the "2015 Wood Heaters rule"), which are the subject of this litigation.

3. Following the filing of this challenge to the 2015 Wood Heaters rule, EPA and Petitioners engaged in discussions concerning the issues that Petitioners have raised with respect to the 2015 Wood Heaters rule that is the subject of this litigation. Based on those discussions, EPA determined that there are certain issues concerning the rule that warrant an opportunity for public comment, and which may lead to revisions to the rule. These issues include issues raised by Petitioners in this litigation and, as well, issues that EPA has itself identified since the rule was promulgated in 2015.

4. Consequently, EPA is currently engaged in a rulemaking process in which EPA has issued, and intends to continue issuing, a sequence of Federal Register notices with respect to the 2015 Wood Heaters rule, as follows:

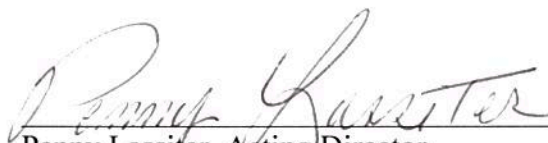
On November 30, 2018, EPA published a Federal Register notice to propose and take comment on amendments to the 2015 Wood Heaters rule related to certain issues raised by the Petitioners in this litigation (see Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces: Proposed Rule, 83 Fed. Reg. 61574). EPA's intent is to take final action on these "first proposal" issues in summer 2019.

Also on November 30, 2018, EPA published an advance notice of proposed rulemaking (ANPRM) in the Federal Register to take comment on additional issues related to the 2015 Wood Heaters rule (see Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces: Advance Notice of Proposed Rulemaking, 83 Fed. Reg. 61585). EPA intends to use the comments received in response to this ANPRM to develop a second proposed rule that it expects to publish by late 2019. EPA's intent is to take final action on these "second proposal" issues by late 2020.

5. Collectively, these Federal Register notices will take comment on revisions to the rule that will address issues raised by Petitioners, as well as other issues that EPA has identified as warranting consideration for possible rule revisions.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 4 th day of February 2019.



Penny Lassiter, Acting Director
Sector Policies and Programs Division
Office of Air Quality Planning and Standards
Office of Air and Radiation
United States Environmental Protection Agency